No. 632

No. Sept. Term, 1894.

507

Brief of Kirlin for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

Filed Nov. 15, 1894.

IN THE MATTER OF THE PETITION OF JAMES KNOTT FOR WRITS OF CERTIORARI IN THE CASES

of

BOTANY WORSTED MILLS
Libelant-Appellee

vs.

JAMES KNOTT
Respondent-Appellant

HENRY P. WINTER AND OTHERS
Libelants-Appellees

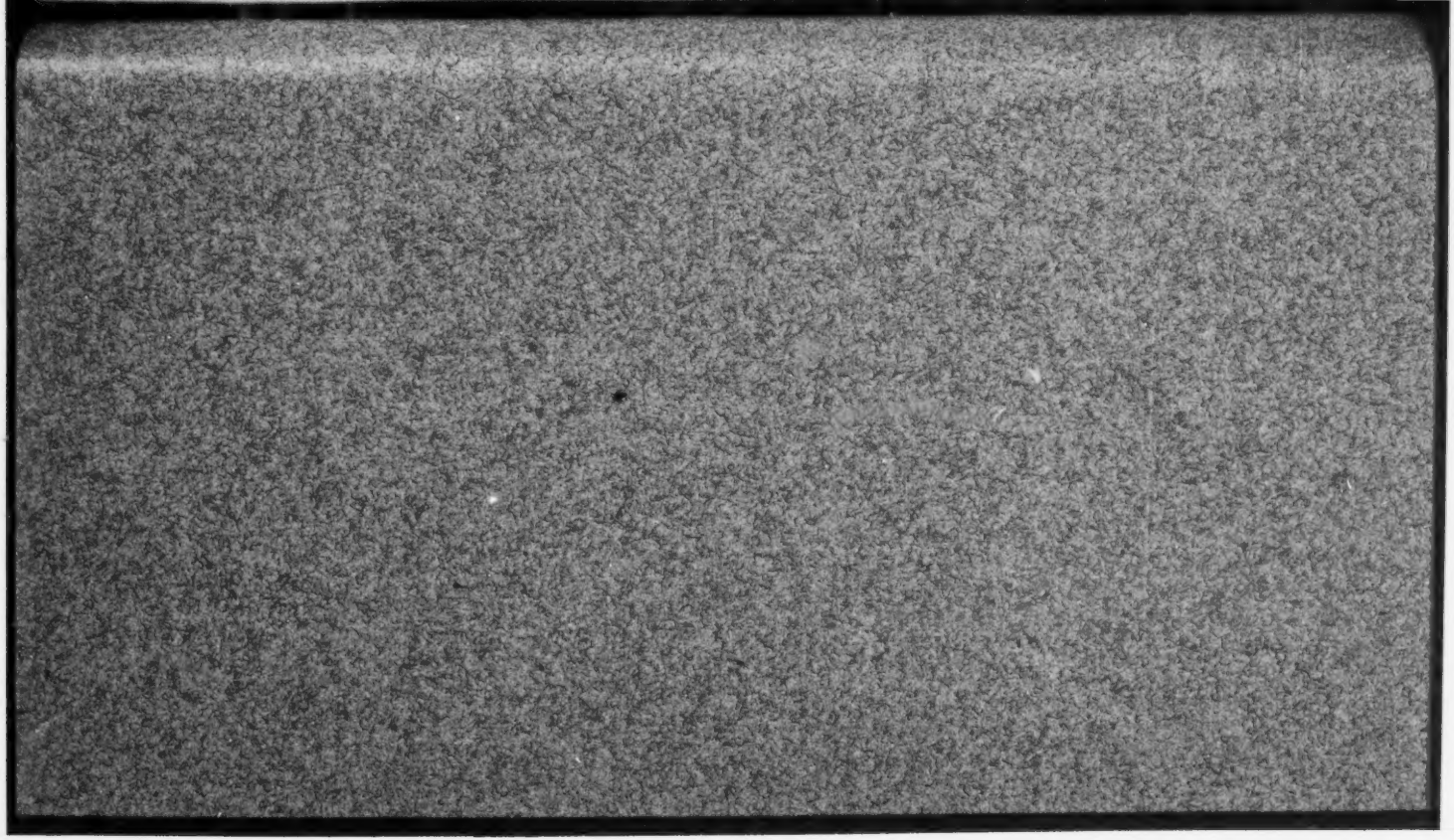
vs.

JAMES KNOTT
Respondent-Appellant

PETITION FOR WRITS OF CERTIORARI

CONVERS & KIRLIN
Proctors for Petitioner

J. PARKER KIRLIN
Of Counsel



Supreme Court of the United States.

BOTANY WORSTED MILLS,
Libelant-Appellee,
vs.
JAMES KNOTT,
Respondent-Appellant.
No.

HENRY P. WINTER and another,
Libelants-Appellees,
vs.
JAMES KNOTT,
Respondent-Appellant.
No.

Please take notice that upon the annexed petition an application will be made to the Supreme Court of the United States, at the opening of court, on Monday, November 15, 1897, or as soon thereafter as counsel can be heard, for writs of *certiorari* herein.

Dated New York, November 11, 1897.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for James Knott, Petitioner.

To Messrs. BLACK & KNEELAND,
Proctors for Botany Worsted Mills.

Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE
Proctors for Winter and another.

4 SUPREME COURT OF THE UNITED STATES.

BOTANY WORSTED MILLS,
Libelant-Appellee,

vs.

JAMES KNOTT,
Respondent-Appellant.

HENRY P. WINTER and another,
Libelants-Appellees,

5 vs.

JAMES KNOTT,
Respondent-Appellant.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

The petition of James Knott, respondent below, respectfully shows unto the Court as follows:

(1.) These were libels *in personam*, filed in the District Court of the United States for the Southern District of New York, to recover damages for injury to certain bales of wool, whilst on a voyage from
6 Buenos Ayres, Argentine Republic, to New York, in respondent's steamer *Portuguese Prince*. The voyage was begun December 21, 1894, and ended about March 30, 1895.

(2.) The wool which was shipped at Buenos Ayres was put in the forward or No. 1 between-deck of the vessel, a proper place, and was properly stowed (Rec., fols. 107, 110, 131, 132), not only with regard to itself, but also with regard to other cargo there laden.

(3.) The bill of lading issued for the wool accorded 7
a privilege to the steamer to trade at intermediate ports—

"With liberty * * * to call at any port or ports in or out of the customary route" (between Buenos Ayres and New York) "in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise" (fols. 24, 49).

(4.) Pursuant to this liberty, the vessel stopped at a number of ports, loading and discharging cargo. 8
At Pernambuco a consignment of wet sugar was taken. So much of this as there was room for was stowed in one of the lower holds; the rest (about 200 tons, fol. 108), was stowed in the after part of No. 2 between-deck, also a proper place, and was properly stowed, both with regard to itself and to the other cargo in the between-decks (fols. 108–110, 131–132). The sugar did not fill the No. 2 between-deck completely. A space remained between the forward end of the tiers of sugar and the wooden partition that separated the No. 2 from the No. 1 between-deck, of about 25 feet, in which there was no cargo (fol. 108).

The sugar was dunnaged off the deck with three-inch planks (fols. 108–110, 131, 132), to prevent any 9
accumulation of the drainage from the bags, which flowed off into the bilges below by means of two two and a half inch scupper pipes located in the after corners of the No. 2 between-decks (fols. 116–120).

There were also two more scupper pipes on opposite sides of this deck, near the wooden partition between No. 1 and No. 2 (fol. 118), but until the next port of call was reached, the sugar drainage passed off through the after scuppers (fol. 167).

(5.) With the cargo thus stowed, the ship, trimmed by the stern (fol. 100), proceeded towards Para, her

10 next port of call. She was seven days on the passage (pp. 46–51). It was agreed by stipulation between the parties that the wool was not damaged during this part of the voyage, but, on the contrary, was sound on arrival at that port (Rec., p. 42).

(6.) At Para some changes in the loading occurred, but the ship was so managed in these operations as to be trimmed two feet by the head (fol. 171) on leaving that port for Port of Spain, Trinidad, her next port of call (fols. 100, 102, 181-216). She was six days on this passage (pp. 54–59), and on arrival there it was found that the sugar drainage had flowed forward, instead of aft, owing to the im-
11 proper trim of the vessel by the head during this part of the passage, and that some part of it had passed the forward scuppers, had overflowed the dunnage under the wool and had caused heavy damage to the wool (p. 42).

(8.) At Port of Spain, the ship was again trimmed by the stern and no further damage to the wool ensued during the remainder of the voyage (p. 42).

(9.) It thus appears, (*a*) that the wool was properly placed and stowed at Buenos Ayres; (*b*) that the sugar was properly placed and stowed at Pernam-
12 buco; (*c*) that the wool went in safety from Pernambuco to Para, the ship being then in proper trim; (*d*) that sugar drainage damaged the wool while she was in improper trim between Para and Port of Spain; (*e*) that there was no further damage after the trim was again put right in Port of Spain.

(10.) Against the libelants' claims, which arose under the circumstances stated, the respondent invoked the third section of the Harter Act and the following exceptions contained in the bill of lading issued at Buenos Ayres:

"To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell, or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted." "Weight and condition of contents unknown."

"*This contract shall be governed by the law of the flag of the ship carrying the goods.*"

It was admitted that the exceptions were valid under British law, which was the law of this ship's flag (fol. 50).

(10.) The District Judge found after "no little embarrassment" (fol. 247), that the loss was due to improper stowage, but notwithstanding that the contract was made abroad between a foreign shipper, and a foreign master, and was valid by the law in view of which they contracted, refused to uphold or give force to the exceptions, for the stated reason that they were opposed to our public policy (p. 66), which was apparently considered material because the bill of lading was sued on by an American assignee. The result was

16 decrees for libelants. There was other damage besides that involved in these suits.

(11.) On appeal by respondent, the decree was affirmed practically on Judge Brown's opinion (Rec., p. 77), but not unanimously. It is to be inferred from the memorandum opinion that one of the Circuit Judges was of opinion that the contract, made abroad between foreigners and expressly stipulating for the law of the ship's flag, should have been upheld. The entry of final decrees on mandate has been stayed to admit of this application being made.

17 (12.) The question whether a contract made abroad, between foreigners, expressly stipulating for the law of the flag, should be upheld in the courts of this country, is one constantly recurring, and is of deep importance to shipowners. The clause is now in common and extensive use, for the purpose, as this petitioner is advised, of providing for harmony and uniformity in the determination of the mutual rights and liabilities of ship and cargo at any stage, or at different stages of the voyage. Without such a clause, a great variety of different laws, as your petitioner is advised, would be liable to be applied. If libelants had sued, as they might have done, in Port of Spain, and the flag clause had not
18 been in the contract, the law of the flag would probably have been applied as that which the parties presumptively intended to control their rights (*Re Missouri*, 42 *Chan. Div.*, 321).

If some accident had occurred after shipment in Buenos Ayres or at a Brazilian port, the *lex loci contractus* would presumably have been applied. If a disaster had occurred *en route*, making it necessary to put into a port of refuge, say at the Danish possession of St. Thomas, the master's powers and duties in regard to bottomry, or transshipment, would presumably have been determinable by the

law of the flag, in the absence of an express stipula- 19
tion.

Pope v. *Nickerson*, 3 *Story*, 465, 484-5.
Lloyd v. *Guibert*, *L. R.*, 1 *Q. B.*, 115.
The Karnack, *L. R.*, 2 *P. C.*, 505, 512.
The Gaetano and Maria, 7 *P. D.*, 137.
Liverpool v. *Phenix Ins. Co.*, 129 *U. S.*, *at p.* 449.

In case of damage to the cargo in a British port, by collision with another British vessel, while in charge of a compulsory pilot, the cargo's rights would be subject to English law.

Smith v. *Coudry*, 1 *How.*, 23.
The Scotland, 105 *U. S.*, 24, 29. 20
The Belgenland, 114 *U. S.*, 355, 370.

In case of a collision with a German vessel in a Brazilian port, the rights of cargo, as against the carrying vessel, would probably be governed by the local law as to pilotage defenses, and by that or the *lex loci* as to other defenses or claims. Many other possible cases can be supposed in which different foreign laws might be applied in the absence of a specific provision for the law of the flag. Without such a clause, as your petitioner is advised, he can never know by what law his rights or liabilities or those of his vessels plying in the South American Line, and in other lines, are to be ad- 21
judged; nor can the shippers of cargoes by his vessels. With the flag clause in his contracts he can obtain advice as to his rights at home, in whatever part of the world his vessels (of which he is part owner and manager of forty-two) may fall in trouble.

(13). This petitioner is advised that the effect of the flag clause has been argued in this Court recently in the case of The *Plymothian* and The *Victory*, Nos. 66 and 67 of this present term.

22 (14.) It is also important that this Court should determine if the operation of the Harter Act is not excluded by the stipulation for foreign law, whether the prohibitions contained in Sections 1 and 2 of that Act are operative upon contracts made abroad, or abrogate the freedom of contract permitted by the foreign law of the place of the contract, or of the particular law selected.

(15.) Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals and of the record in the last named court, as well as a copy of his brief in said Court.

23 Wherefore, your petitioner prays that this Honorable Court will cause writs of *certiorari* to be issued in the foregoing entitled cases pursuant to the power vested in this court by the Act of Congress entitled "An Act to Establish Circuit Courts of Appeals," &c., approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the matter in controversy in the same manner as though the cause had been brought to this Court for review by appeal; and your petitioner will ever pray, &c.

JAMES KNOTT,

24 By CONVERS & KIRLIN,
His Proctors.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

HERBERT BERNARD SAUNDERS, being duly sworn, says: That he is superintendent at the port of New York for the petitioner, James Knott, who resides at Newcastle, England, and is now absent from the District; that he has personal knowledge as to many of the matters stated in the foregoing petition from his examination of the ship and cargo upon her

arrival in New York at the conclusion of the voyage; 25
that he has read the foregoing petition, and that the matters therein stated are true of his own knowledge, except such as occurred upon the voyage, and that he is informed and believes that such matters are true, the basis of his information and belief being statements made to him by the officers of the vessel and the evidence adduced at the trial of the cause.

H. B. SAUNDERS.

Sworn to before me this 12th day of November, 1897.

FREDERICK GREEN,
[SEAL.] Notary Public,
New York County. 26

I HEREBY CERTIFY that the foregoing petition is presented in good faith, and not for the purpose of delay, and that, in my opinion, the case is a proper one for granting the relief prayed for.

J. PARKER KIRLIN,
Of Counsel for Petitioner.